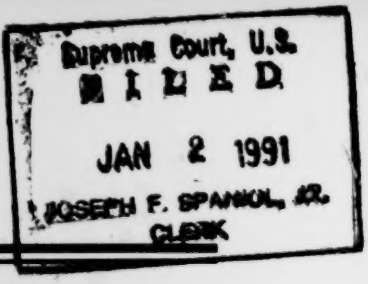
90-1083

No.



In The
Supreme Court of the United States
October Term, 1990

VILLAGE OF WILMETTE AND
FRED W. STOECKER,

Petitioners

V.

NATIONAL PEOPLES ACTION,

Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT J. MANGLER
1200 Wilmette Avenue
Wilmette, Illinois 60091
(708) 251-2700
(Counsel of Record)

DuBane's Print Shop, Inc. (312) 782-5877

QUESTIONS PRESENTED

1. Did the Seventh Circuit, in applying the "standards" for a Preliminary Injunction, ignore some of those standards and misconstrue the District Court's findings?

2. Is a municipal ordinance requiring fingerprints for a door-to-door solicitors' permit one which promotes a substantial government interest or does it impede First Amendment freedom of speech?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, the Village of Wilmette, IL, a municipal corporation, and Fred W. Stoecker, Chief of Police, of the Village of Wilmette, IL.

The respondent in the proceedings below and in this court is National Peoples Action.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT

I. The Seventh Circuit in applying the "standards" for a Preliminary Injunction ignored some of those standards and misconstrued the District Courts' findings 5

II. The decision of the Seventh Circuit affirming the District Court finding that the fingerprint requirement served no legitimate governmental purpose is contrary to other decisions of the Federal Courts 7

CONCLUSION 8

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases

Baja Contractors v. City of Chicago, 830 F.2d. 667 (1987) 5, 6

Brunswick Corp. v. Jones, 784 F.2d 271, (1987) 6

Cantwell v. Connecticut, 310 U.S. 296 (1940) 6, 7

City of Watseka v. Illinois, Public Action Council, 796 F.2d. 1547 (7th Cir. 1986). AFF'D 479 U.S. 1048, 107 S. Ct. 919 (1987) 7, 14a

Curtis v. Thompson, 840 F.2d. 1291 (1988) 6

Holy Spirit Assn. for the Unification of Christianity, et. al., v. Hodge, 582 F. Supp. 492 (N.D.TEX.) (1984) 7

Martin v. City of Struthers, 319 U.S. 141 (1943) 6, 7

New Jersey Citizens Action v. Edison Township, 797 F.2d. 1250 (3 CA) (1980) 7, 9a

Ping v. National Education Assn., 870 F.2d. 1369 (7th CA, 1989) 5

Roland Machinery Co., v. Dresser Industries, 749 F.2d. 380 (7 CA) (1984) 5

Thomas v. Collins, 323 U.S. 516 (1945) 7

Thornton v. Barnes, 890 F.2d. 1380, (7th CA, 1989) 5a

Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989) ... 7a, 9a

No.

In The
Supreme Court of the United States
October Term, 1990

VILLAGE OF WILMETTE AND
FRED W. STOECKER,

Petitioners

V.

NATIONAL PEOPLES ACTION,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners, Village of Wilmette and Fred W. Stoecker, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above entitled proceedings on October 3, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 914 F.2d 1008, and is reprinted in the appendix hereto, p. 1a, *infra*.

The decision of the United State District Court for the Northern District of Illinois, (Plunkett, D.J.) has not been reported. The District Court issued oral findings of fact in support of its decision and a transcript is reprinted in the appendix hereto, p 13a, *infra*.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. §1983, the respondent brought this suit in the Northern District of Illinois. On December 8, 1988, the Northern District denied the respondents' motion for a temporary restraining order. See p. 3 *infra*.

On November 2, 1989, the Northern District denied the respondent's motion for a preliminary injunction as to the five year felony conviction rule in petitioner's ordinance, but granted a preliminary injunction as to the fingerprint requirement. See p. 3, *infra*.

On petitioners' appeal, the Seventh Circuit, on October 3, 1990, entered judgment and an opinion affirming the Northern District's granting of a preliminary injunction as to the fingerprint requirement. Respondent did not appeal the denial of an injunction on the five year felony conviction rule. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 USC §1254 (1).

Constitutional Provision, Statutes and Ordinances Involved

Fourteenth Amendment, U. S. Constitution

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law....

Village of Wilmette Ordinance, Chapter 5, Section 5-5.3 is set forth in the Appendix at p. 21a.

STATEMENT OF THE CASE

This case is a complaint for Injunctive Relief and Damages by the National People's Action against the Village of Wilmette

and Chief of Police Fred Stoecker. The complaint challenges the validity of two sections of the Village Ordinance requiring registration by door-to-door solicitors.

One of the challenged sections prohibits the issuance of a solicitor's permit to one who has been convicted of a felony within five years of the date of the application. The other is a requirement that all applicants be fingerprinted.

National People's Action employees sought permits to conduct door-to-door solicitation for the organization's efforts on public issues such as objection to utility rate increases. They also solicit funds for the organization.

When several of the National People's Action sought permits on November 1988, and were told of the fingerprint requirement, they refused, and National People's Action brought this action. This action was filed on November 30, 1988, and a motion was made for a Temporary Restraining Order. Following a hearing on December 7, 1988, the Temporary Restraining Order was denied on December 8, 1989. The District Court then set a hearing date for a Preliminary Injunction, although no motion for such was made.

The hearing for the Preliminary Injunction was continued from time to time at the request of Plaintiff on behalf of the Court until February 23, 1989, and the hearing was concluded on February 28, 1989. On February 23, 1989, Plaintiff was given leave to file a motion for Preliminary Injunction which had not been done until that time. On February 28, 1989, the Court indicated that a ruling would be made on March 10, 1989.

On March 10, 1989, the Court indicated he would deny a Preliminary Injunction on the ordinance requirement that no solicitor permits are permitted for one with a felony conviction within the past five years, but that he would grant a preliminary injunction against the fingerprint requirement of the Village Ordinance.

Counsel for Defendants requested the District Court to stay the order for a short time in order to appeal to the Court of

Appeals. The District Court then said, "THE COURT: I guess I should stay it, because the law is sparse enough that I suppose reasonable minds could differ on this decision that I made, and when I denied the TRO, I said, I didn't see any immediate harm to fundraising group that has 400 places to go where they can't go to one for while or at least argue they can't go to one. I will stay it pending appeal." (17a, *infra*)

The District Court then indicated that the order and opinion would be issued "in a week."

The matter was put off by the Court time after time until November 2, 1989, when the Court entered its order granting the Preliminary Injunction as to Section 55.3 of the Wilmette Village Code. At this hearing, Counsel for Defendants renewed the request for a stay of the order and quoted from the record the statement of the Court on March 10, 1989. The Court denied the request for a stay. (19a).

The response of the Court was "Well, you see, the nice thing about this is I can always change my mind." The Court further stated that an injunction to one section of the ordinance would not harm the Village and, he said, it does hurt these people "somewhat" in soliciting in Wilmette. (19a).

The Seventh Circuit affirmed the issuance of the Preliminary Injunction. The Court reviewed a number of factors which the District Court must consider. (4a)

The Seventh Circuit acknowledged the decisions of the Supreme Court approving the use of identification devices as a requirement for a solicitors permit. (6a) But the Circuit agreed with the District Court that the fingerprint requirement in this instance was unnecessary and could not be used to check criminal records and that such a check was possible through other means. (9a)

The Seventh Circuit briefly touched on one of the two cases directly on the question of requiring fingerprints from Solicitor applicants. (footnote 5, 9a)

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit in applying the "standards" for a Preliminary Injunction ignored some of those standards and misconstrued the District Courts' findings.

The Seventh Circuit cited a number of decisions relating to the issuance of preliminary injunctions. One of those cases, *Roland Machinery Co. v. Dresser Industries*, 749 F.2d. 380, (7th Cir., 1984) contains the following: "...the relevant case law is in disarray in both this and other circuits." (749 F.2d. 380, 382). It is submitted that the Supreme Court should put an end to this "disarray."

While some of the cases cited by the Seventh Circuit and, indeed, cited by these petitioners, contain as many as four or five criteria for a preliminary injunction, most seem to agree on three basic principles. The movant must show 1) They have no adequate remedy at law, 2) They will suffer irreparable harm if the injunction is not granted, and 3) They have *some* likelihood of success on the merits in that their chances are better than negligible. (p. 5a, *infra*)

The word "some" is stressed by the Court. The Court later says "the record...amply supports its determination that plaintiff established a probability of success on the merits."

But that list of three (or four or five) criteria contains another word which should be stressed. After 1) and 2), the word "and" appears. *Ping V. National Education Association*, 870 F2d. 1369, 1371 (7th Cir., 1988). This would mean, in an ordinary interpretation, that the movant must meet *all* the criteria. And, indeed, in *Baja Contractors v. City of Chicago*, 830 F2d. 667 (7th Cir., 1987), where movant failed to meet one of the criteria, the Injunction was denied. Also, in *Ping* supra., there was no showing of irreparable harm, and the injunction was denied.

While *Roland* supra, says "some likelihood of prevailing on the merits, other cases say "a reasonable likelihood." *Baja*,

supra., *Brunswick Corporation v. Jones*, 784 F.2d. 271 (7th Cir., 1986), and *Curtis V. Thompson*, 840 F.2d. 1291 (7th Cir., 1988).

What is this "ample support in the record" that the Seventh Circuit sees? At the hearing on the Temporary Restraining Order (which was denied), the District Court said "It is a close question. It could go either way." At the close of the hearing on the Preliminary Injunction, the Court said, "The law is sparse enough that I suppose reasonable minds could differ on this decision that I made."

As to "irreparable harm," which is supposed to be one of the essential elements, the record contains the following statement of *the District Court*.

> "when I denied the TRO, I said, I didn't see any immediate harm to a fund raising group that has 400 places to go where they can't go to one for a while or at least argue they can't go to one."

The Seventh Circuit took petitioners to task for stating this about the issue of irreparable harm. (p. 9a *infra*). The source was the District Court, not petitioners.

In a number of Seventh Circuits decisions, (*Baja*, Supra., *Brunswick*, supra., and *Curtis*, supra.) the Courts have said the plaintiff must show, "that the injunction will not harm the public interest." *Baja*, 830 F.2d. 667, 675.

After acknowledging that the Supreme Court has approved the use of identification devices for solicitors in *Martin v. City of Struthers*, 319 U.S. 141, 148 (1943) and *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940), (p. 6a, *supra*), the Seventh Circuit then concludes that the fingerprinting requirement served little or no legitimate governmental purpose.

The wide variety of application of standards for preliminary injunctions should be addressed by this Court and plenary consideration should be given.

II

The decision of the Seventh Circuit affirming the District Court finding that the fingerprint requirement served no legitimate governmental purpose is contrary to other decisions of the Federal Courts.

While ruling on the elements of a preliminary injunction, the Seventh Circuit addressed the challenged ordinance on the merits concerning the application of the First and Fourteenth amendments to the Constitution (p. 7a, *infra*).

The parties below agreed that there were but two Federal Cases directly on the point of fingerprint requirements in solicitor ordinances. Respondent had cited *New Jersey Citizen Action v. Edison Township*, 797 F.2d. 1250 (3rd Cir., 1986). The Seventh Circuit mentions this case in a footnote. (p. 9a, *supra*). The dissent in this case, by Judge Weis, is most important and should be considered.

The petitioners cited *Holy Spirit Assn. v. Hodge*, 582 F. Supp. 492 (N.D. Tax 1984). That Federal Court upheld the fingerprint requirement of the City of Amarillo ordinance and relied on *Martin*, supra, *Cantwell*, supra and particularly, *Thomas v. Collins*, 323 U.S. 516 (1945). All these decisions would permit the fingerprint requirement.

The entire question of municipal solicitors ordinances is one of national importance. While this court has ruled on many elements of this question, the fingerprint requirement has not been considered in recent years. Respondent had cited Watseka v. Ill. Public Action Council, 796 F.2d. 1547 (7th Cir., 1980), AFF'D 479 U.S. 1,048 (1987), as controlling in solicitors ordinances. However, that affirmance by the Supreme Court was summary and was dissented from by three Justices on the ground that the Court of Appeals should not have imposed a requirement of the least restrictive means. (White, J., Rehnquist, C.J. and O'Connor, J.)

This Court should consider the fingerprint question and resolve the differences between the various holdings.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted. The elements of a preliminary injunction should be defined by this Court so that all Circuits may be uniform. The fingerprint issue is of national concern and this Court should rule, or, in the alternative, vacate the order and remand for a full evidentiary hearing.

Respectfully submitted,

Robert J. Mangler
1200 Wilmette Avenue
Wilmette, IL 60091
708-251-2700

APPENDIX

Opinion of the
United States Court of Appeals
For the Seventh Circuit
914 F.2d 1008, 1990
Decided October 3, 1990

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-3446

NATIONAL PEOPLE'S ACTION,

Plaintiff-Appellee,

v.

VILLAGE OF WILMETTE and FRED W. STOECKER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 10017—**Paul E. Plunkett, *Judge*.**

ARGUED MAY 18, 1990—DECIDED OCTOBER 3, 1990

Before COFFEY, RIPPLE, and MANION, *Circuit Judges.*

RIPPLE, *Circuit Judge.* National People's Action (NPA) filed suit pursuant to 42 U.S.C. § 1983 against the Village of Wilmette (Village), challenging the constitutionality of the Village's registration ordinance regulating door-to-door solicitation. NPA sought money damages and an injunction against further enforcement of the ordinance. The district court denied NPA's motion for a preliminary injunction against the Village's prohibition of solicitors who have been convicted of a felony within the previous five years, but the court granted NPA's motion for a preliminary injunction against the Village's requirement that prospective solicitors submit fingerprints on their application

for registration. The appellants filed a timely notice of appeal. For the following reasons, we affirm.

I
BACKGROUND

A. *Procedural Posture*

NPA's complaint alleged that section 5-5.3 of the Village of Wilmette Code (registration of solicitors) violated its first amendment free speech rights because the fingerprinting requirement discouraged its employee-solicitors from applying for a solicitation permit. In addition, the complaint alleged that the ordinance was overly broad in prohibiting the registration as a solicitor of any person who had been convicted of a felony within the previous five years.

The district court denied a preliminary injunction regarding the prohibition against the registration of felons. It granted a preliminary injunction regarding the fingerprinting requirement. The Village and Police Chief Stoecker appealed the grant of the preliminary injunction.[1] On November 17, 1989, the appellants moved in this court for an order staying the preliminary injunction. A motions panel of this court denied the stay on December 14, 1989.

B. *District Court Proceedings*

The first witness at the hearing on the preliminary injunction was Fred Stoecker, the chief of police for the Village. He testified that a prospective solicitor was required to submit a registration application and to be fingerprinted in the lobby of the police station.[2] Chief Stoecker

---

[1] NPA does not appeal the denial of a preliminary injunction on the five year felon restriction, and thus we shall not consider that issue.

[2] There was a room outside the view of the general public for use in taking the fingerprints of suspects.

acknowledged that the fingerprints on the registration form (as opposed to special fingerprint cards) could not be used for classification purposes. Upon questioning by the court, Chief Stoecker testified that the fingerprinting requirement served two purposes: to use for comparison purposes in the event a solicitor is suspected in a crime, and to receive more accurate information on the registration form. When the court asked Chief Stoecker to clarify the latter purpose, the following colloquy ensued:

> Q. [by the court] What is the basis for your belief that if fingerprints are required on that form the information that you get from the person seeking to be a solicitor in your town will be more accurate?
>
> A. We have had many occasions when we are asked for applications and they are sent in, information is sent in, and once solicitors come into the building and see the process they leave.
>
> Q. So that is the basis for that belief?
>
> A. Yes.

Tr. of Feb. 23, 1989 at 18.

The court also received testimony from Frederick Clauser, the deputy chief of police, who stated that he was unaware of any occasion in which the fingerprints on the registration forms were used to confirm that a solicitor had committed a crime, although he believed that it would be feasible to use the fingerprints in that manner.[3] Finally, several NPA solicitors testified that they refused to give fingerprints at the police station because the process was associated with having committed a crime. Rather

[3] Although Chief Stoecker originally stated during his testimony that the fingerprints had been used in burglary investigations, Tr. of Feb. 23, 1989 at 18-19, he admitted on further examination that that statement might be inaccurate: "I might have been inaccurate in saying that we use the prints for comparisons. More accurately, I would say that we found that solicitors were involved in burglaries in the community on two occasions." *Id.* at 19.

than be fingerprinted, the solicitors chose not to solicit in Wilmette.

On November 2, 1989, the district court issued oral findings of fact in support of its decision to grant a preliminary injunction. The court summarized its conclusion as follows: "The Court is not convinced that the requirement serves any useful purpose and, further, it finds it significantly deters qualified solicitors from coming into the village." Tr. of Nov. 2, 1989 at 6. In addition, the court found that the evidence at the hearing indicated that the fingerprints were not used to check identification, and that the Village had other means available to check if the applicants had a criminal record. With respect to the use of the fingerprints in later criminal investigations, the court concluded:

> The only possible use of these prints for a legitimate government purpose might be in solving a crime where latent prints were found at the scene, however, because of the way the prints are taken such use here is problematic. Further, the evidence does not reflect that this has ever happened in Wilmette.
>
> We conclude that the village fingerprint requirement at best only slightly serves some kind of a government interest, that it has the effect of chilling proper solicitation, and in fact is used by Wilmette for that very purpose.

Id. at 7.

II

ANALYSIS

A. *The Applicable Standards*

1.

The standards that apply to a grant of a preliminary injunction are well established. Initially, the district court must consider a number of factors in deciding whether to grant a preliminary injunction:

> Before a preliminary injunction will issue, the movant must show, as a threshold matter, that: (1) they have no adequate remedy at law; (2) they will suffer irreparable harm if the injunction is not granted; and (3) they have *some* likelihood of success on the merits in the sense that their "chances are better than negligible." *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 386-87 (7th Cir. 1984); *see also Lawson Products, Inc. v. Avnet, Inc.*, 782 F.2d 1429, 1433 (7th Cir. 1986). If the movant can meet this threshold burden, the inquiry then becomes a "sliding scale" analysis of the harm to the parties and the public from the grant or denial of the injunction and the actual likelihood of success on the merits.

Ping v. National Educ. Ass'n, 870 F.2d 1369, 1371 (7th Cir. 1989) (emphasis in original).

The standard that we apply to review the district court's determination is "tailored to the various functions that the district court must perform in fulfillment of its responsibilities." *Thornton v. Barnes*, 890 F.2d 1380, 1384 (7th Cir. 1989). This court summarized this review as follows:

> [T]he preliminary injunction decision involves the resolution of a number of different issues, some of which are non-discretionary; others, like the final weighing and balancing of the equities, are classically left to the discretion of the district judge. Appellate review therefore must vary with the nature of the lower court decision. When a court of appeals considers a preliminary injunction order, which should set forth the judge's reasoning under Fed.R.Civ.P. 65(d), the factual determinations are reviewed under a clearly erroneous standard and the necessary legal conclusions are given *de novo* review. *SEC v. Suter*, 732 F.2d 1294, 1300 (7th Cir.1984); *E. Remy Martin & Co. v. Shaw-Ross International Imports*, 756 F.2d 1525, 1529 (11th Cir.1985). However, the ultimate evaluation and balancing of the equitable factors is a highly discretionary decision and one to which this

> court must give substantial deference. The variance in the standard of review expressed in *Roland* may, in part, be attributed to the existence of errors of law or fact. Clearly, a factual or legal error may alone be sufficient to establish that the court "abused its discretion" in making its final determination.

Lawson Prods., Inc. v. Avnet, Inc., 782 F.2d 1429, 1437 (7th Cir. 1986); *see also Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1014 (7th Cir. 1990) (factual determinations reviewed on abuse of discretion standard). Based on these standards, " ' "our review is limited to determining 'whether the judge exceeded the bounds of permissible choice in the circumstances, not what we would have done if we had been in his shoes.' " ' " *Thornton*, 890 F.2d at 1385 (quoting *International Kennel Club, Inc. v. Mighty Star, Inc.*, 846 F.2d 1079, 1084 (7th Cir. 1988) (quoting *A.J. Canfield Co. v. Vess Beverages, Inc.*, 796 F.2d 903, 906 (7th Cir. 1986) (quoting *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 390 (7th Cir. 1984)))); *see also Cox v. City of Chicago*, 868 F.2d 217, 219 (7th Cir. 1989) (review of grant or denial of preliminary injunction is under abuse of discretion standard); *David K. v. Lane*, 839 F.2d 1265, 1271 (7th Cir. 1988) (deferential standard of review).

2.

An ordinance that regulates first amendment activity must be "narrowly drawn." *Village of Schaumberg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980); *Hynes v. Mayor of Oradell*, 425 U.S. 610, 617 (1976). Also, the ordinance must be designed not to "unnecessarily interfer[e] with First Amendment freedoms." *Schaumberg*, 444 U.S. at 637. " 'Precision of regulation must be the touchstone . . . .' " *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

The Supreme Court, in *dicta*, has approved the use of identification devices as a requirement for receiving a solicitation permit. *See Martin v. City of Struthers*, 319

U.S. 141, 148 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940); *see also Hynes*, 425 U.S. at 618. This regulation is allowed because of the legitimate interests of the state to protect its citizens from criminal elements and unwanted disruptions at home. *Hynes*, 425 U.S. at 618; *Martin*, 319 U.S. at 148. Finding the proper means to control solicitation is a problem that "must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home." *Martin*, 319 U.S. at 148-49. Nevertheless, such restrictions on expression must be content-neutral and "narrowly tailored to serve a significant governmental interest," and they must "leave open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *see also Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808, 812 (1984). In applying this standard, it must be remembered that the Supreme Court has reaffirmed—emphatically—"that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate content-neutral interests but that it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied 'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2757-58 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)) (footnote omitted).

B. *Application to This Case*

The parties in this case mainly dispute one of the elements necessary to support a preliminary injunction: NPA's likelihood of success on the merits. NPA charges that the fingerprinting requirement unnecessarily impedes its first amendment freedom of speech, as applied to the states

by the fourteenth amendment,[4] because it is intended to discourage applicants for solicitation permits. NPA contends that the ordinance does not serve a legitimate governmental objective because there is no evidence that the required fingerprinting deters criminal conduct or would significantly aid investigations of future criminal conduct. With respect to the latter point, NPA points out that, even if identifying criminals is a legitimate goal, the fingerprinting in this case is ineffective in achieving that goal because of the nonprofessional manner in which the fingerprints are taken. NPA concludes that the ordinance is not narrowly tailored because "sufficient, narrower, and less stigmatizing means of corroborating the identity of solicitors and deterring criminal behavior," Appellee's Br. at 23, are available and indeed have been used by the Village. Moreover, the Village allows citizens to place "no solicitor" signs on their door to deter criminals posing as solicitors.

The record before the district court amply supports its determination that the plaintiff established a probability of success on the merits. First, the court, which was permitted to make credibility determinations, concluded that the fingerprints, as taken by the Village, "really cannot be used to check for criminal records and the village does not try to do that." Tr. of Nov. 2, 1989 at 6. In short, *on the record before it*, the district court was entitled to conclude that the fingerprinting requirement served little or no legitimate governmental purpose. The only possible use of the fingerprints was to assist the authorities in later criminal investigations. However, the district court found specifically that the use of the fingerprints for this purpose was "problematic," *id.* at 7, because of the manner in which the prints were taken. Furthermore, the court concluded that "the evidence does not reflect" that the prints were ever used for such a purpose in Wilmette. *Id.* Accordingly, we cannot say, as *Ward* requires, that

[4] *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

the " 'regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.' " *Ward*, 109 S. Ct. at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

Moreover, the district court emphasized that the fingerprinting procedure also affirmatively discourages protected activity:[5]

> Indeed, in an effort to justify the fingerprinting the chief of police stated in response to a question by this Court that the only tangible benefit he saw from the fingerprinting was that it discouraged solicitors and that many left the village rather than comply with the requirement.

Tr. of Nov. 2, 1989 at 6-7. The district court's conclusion as to the true purpose and effect of the fingerprinting requirement is substantiated by the fact that, although the fingerprinting procedure was of no help in checking criminal records, such a check was easily possible through other means.

The appellants also contest—in a rather conclusory and superficial manner—the other elements necessary to support a preliminary injunction. The appellants claim that NPA will not suffer irreparable harm because the group can solicit in all the other cities and villages in Illinois. We reject this argument. The harm created by restricting the prospective solicitors' right of expression in Wilmette cannot be cured by pointing to other municipal-

[5] The Third Circuit dealt with a similar fingerprinting requirement in *New Jersey Citizen Action v. Edison Township*, 797 F.2d 1250 (3d Cir. 1986), *cert. denied*, 479 U.S. 1103 (1987). After reviewing the Supreme Court precedent, *id.* at 1263-65, the court concluded that there was not a substantial relationship between the fingerprinting and an important state interest. *Id.* at 1265. The court noted that the fingerprints would assist in the apprehension of a canvasser who commits a crime, but determined that the city had not shown a relationship between canvassers and criminal behavior. *Id.*

ities that do allow free exercise of speech. Even a temporary deprivation of first amendment freedom of expression rights is generally sufficient to prove irreparable harm. *See Citizens for a Better Env't v. City of Park Ridge*, 567 F.2d 689, 691 (7th Cir. 1975); *Schnell v. City of Chicago*, 407 F.2d 1084, 1086 (7th Cir. 1969); *see also* 11 C. Wright & A. Miller, Federal Practice and Procedure § 2948 at 440 (1973); *cf. Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965) (allegation of impairment to freedom of expression demonstrated an irreparable injury); *Somerset House, Inc. v. Turnock*, 900 F.2d 1012, 1018 (7th Cir. 1990) (allegation of first amendment violation supports finding of irreparable injury). The district court found that the fingerprinting requirement inhibited protected speech in Wilmette by discouraging prospective solicitors from filling out the required registration form. This finding is not clearly erroneous and does support a conclusion of irreparable harm.

The appellants also assert that NPA has an adequate remedy at law because there would be a full hearing in the future. But injunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages. *See generally Flower Cab Co. v. Petitte*, 685 F.2d 192, 195 (7th Cir. 1982) ("In [first amendment] cases the quantification of injury is difficult and damages are therefore not an adequate remedy.").

Finally, the appellants assert that the harm that the Village would suffer outweighs the harm to NPA, because of the harm that a criminal can inflict should one obtain a solicitor's permit. This argument ignores the district court's finding that the fingerprints are not used to check criminal records and that the Village has other means that it currently uses to check the records. As we have noted, the district court's finding that the fingerprinting requirement does not serve to deter crime is not clearly erroneous.

Based on the record before us, we conclude that the district court did not err in granting a preliminary injunction.

Conclusion

The judgment of the district court is affirmed.

AFFIRMED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 79004—Midwest Law Printing Co., Inc., Chicago—10-3-90—500

Findings of Fact and
Decision of U.S. District
Court (N.D. Ill), (Plunkett, J.)
November 2, 1989
Reproduced from Official Reporter's
Transcript. No Separate Order
was Issued.

THE CLERK: 88 C 1007, National People's Action versus Village of Wilmette: ruling and plaintiff's motion to remove stay of preliminary injunction.

MR. VOCI: Good afternoon, your Honor. Edward Voci. V-o-c-i, on behalf of plaintiff.

MR. MANGLER: Robert Mangler for the defendants.

MR ROGUS: Greg Rogus, also for the defendants.

THE COURT: Let me read my findings into the record and then we will deal with whatever this is. There is never an end to this. It is lucky I got this thing put together, too, because for the next three months I am continuously on trial.

I am going to vacate the earlier order, I think, and enter it as of today, so the appeal rights start as of today. The last one is sitting there and heaven knows what the Seventh Circuit would do with that order. All right? I don't see what else I can do.

Well, be seated, and I will read this. Then we will see what else there is to do. The Village of Wilmette has an ordinance governing solicitations in their village. The ordinance requires registration of solicitors with the police department. The ordinance requires a solicitor to complete a solicitation application. The ordinance requires the prospective solicitor to furnish some form of identification.

The ordinance requires the police department to make criminal background checks through various computer linkups in and outside the state where criminal records are kept.

The ordinance provides that no solicitation permit will be granted to anyone who has a felony conviction in the previous five years, and, finally, the ordinance requires that every applicant submit a set of fingerprints over the counter on the space provided on the solicitation application.

The ordinance is under attack by the National People's Action, an organization which is the plaintiff. NPA is a group dedicated to disseminating information about and soliciting funds for public causes of one kind or another.

NPA in late 1988 sought to solicit funds in the Village of Wilmette in order to fight Commonwealth Edison's rate

increases. Several of the prospective solicitors came to the police station and filled out the necessary solicitation forms. However, several balked at giving their fingerprints.

This lawsuit followed, challenging the constitutionality of the Wilmette solicitation ordinance. NPA's attack is on two fronts: First it claims that the five-year felony ban is unconstitutional and, secondly, it claims the fingerprint requirement is unconstitutional, both because they violate the First Amendment rights of free speech.

The Court conducted a hearing at which several employees of NPA and several members of the Wilmette Police Department testified.

The court concludes that the Wilmette ban on solicitations by persons convicted of a felony in the last five years is constitutional. It concludes that the Wilmette requirement of fingerprinting is unconstitutional. Accordingly we enjoin the enforcement by Wilmette of its ordinance provision IV-D(4) requiring that every applicant supply a set of fingerprints.

In City of Watseka vs. Illinois Public Action Council, 796 Fed 2d 1547, Seventh Circuit, 1986, the Seventh Circuit enunciated the test for government regulation of speech as follows:

> "To sustain a time, place and manner restriction on First Amendment activities the government must show that the restrictions are content-neutral, serve a legitimate government objective, leave open ample alternative channels of communication and are narrowly tailored to serve the government objective."

NPA makes no claim that the contents of its speech is affected either by the felony disability or by the fingerprinting requirement. The defendant does not argue, and the Court finds, that there are no other means of conveying the message to the village residents other than the manner that NPA seeks to use, that is, direct solicitation of village residents. Thus, we discuss the requirements of 2 and 4 of the Watseka test.

It is clear that the felony disability serves a legitimate government objective. Wilmette can act to reasonably protect the privacy of its citizens and to prevent crime within its village.

The only question is whether the village has adopted a narrowly tailored remedy to protect that interest.

NPA suggests that the five-year felony rule is arbitrary in that it could be two years or 10 years and the rule does not distinguish between types of felonies, for example, fraud on an income tax return versus murder.

The Court is not persuaded by this argument. Wilmette has a legitimate interest in refusing solicitor licenses to convicted felons. Solicitors call on people's homes throughout the village, often in the evening hours when the most people are home. The village has the right to screen those who will be allowed to go those homes to prevent felons from causing harm to businesses or home owners.

Felony convictions have long been recognized as an appropriate test of credibility in the federal courts under the Federal Rules of Evidence and an appropriate test for whether to allow citizens to assume certain responsibilities such as voting and serving on juries. The Court does not believe the city is required ot adopt some kind of an ordinance which limits denial of solicitation to certain kinds of felonies. Felonies by definition are serious offenses.

Given the interests sought to be protected by the village, a five-year felony disability is not only a reasonable, but a proper restriction on door-to-door solicitations.

The evidence at the hearing suggested that the fingerprints once taken are frequently not used by the village for any sort of fingerprint check. Indeed, they are not even placed on an appropriate fingerprint card, but only on the solicitation form. The prints really cannot be used to check for criminal records and the village does not try to do that.

Further, the testimony shows that Wilmette verifies the names and addresses of all the solicitors and has the capacity to check those verified names through a large number of computers for criminal records.

Indeed, in an effort to justify the fingerprinting the chief of police stated in response to a question by this Court that the only tangible benefit he saw from the fingerprinting was that it discouraged solicitors and that many left the village rather than

comply with the requirement. In the Court's view, this is not a legitimate government objective, namely, to chill First Amendment speech.

Contrasted with that was the testimony of many of the solicitors who testified in this case who said that they felt fingerprinting made them feel like criminals and discouraged them from their solicitation work. The only possible use of these prints for a legitimate government purpose might be in solving a crime where latent prints were found at the scene, however, because of the way the prints are taken such use here is problematic. Further, the evidence dies not reflect that this has ever happened in Wilmette.

We conclude that the village fingerprint requirement at best only slightly serves some kind of a government interest, that it has the effect of chilling proper solicitation, and in fact is used by Wilmette for that very purpose. The fingerprint requirement therefore fails the Watseka test.

We also conclude that an injunction against the enforcement of this fingerprint requirement is appropriate. The deprivation is irreparable and cannot be compensated.

The plaintiff is believed to be by this Court likely to succeed on the merits. Indeed, there is a Third Circuit case, New Jersey Citizens Action vs. Edison Township, which in the Court's view is strikingly similar to this case. I believe that the plaintiff has met all the requirements to show an injunction is appropriate and the injunction is granted.

We will enter that order as of today and grant the injunction as of today. Now, having thought I finished with this and sent you on your way, what is this, a motion to remove stay of preliminary injunction by the plaintiff?

MR. VOCI: Yes, Judge. When you entered, I guess, your oral ruling at the conclusion of evidence, counsel moved orally for a stay –

THE COURT: Yes.

MR. VOCI: I voiced an objection to that. Now I am –

THE COURT: What has happened in the meantime?

MR. MANGLER: Well, we have had no order, no ruling to take an appeal, Judge.

THE COURT: I understand that. So you have just gone on and enforced the ordinance?

MR. MANGLER: And all the other organizations in that group that was testified to have continued to apply for solicitors permits and give fingerprints. As a matter of fact some documents that I gave counsel just last week indicated we have 222 solicitors applications just since this case began.

Your Honor, just to make sure that we get all the facts as stated, I have the transcript of the hearing of March the 10th where I asked that in the event your Honor would issue a temporary or a preliminary injunction, and I said I had some question about that and I wanted to take it up, and you expressed a little surprise at the time, I asked for a short stay to go to the Seventh Circuit, and what the Court said, and I have the transcript here, you double-checked to see whether or not the preliminary injunction was an appealable order, we agreed that it was –

THE COURT: Right.

MR. MANGLER: – and the Court said, and you can read it if you want:

> "I guess I should stay it, because the law is sparse enough that I suppose reasonable minds could differ on this decision that I made, and when I denied the TRO I said I didn't see any immediate harm to a fund-raising group that has 400 places to go, where they can't go to one for a while, or at least they argue they can't go to one. I will stay it pending appeal."

That was the decision of the Court at that time.

THE COURT: Mr. Voci, what is your position?

MR. VOCI: I guess I have a question of Mr. Mangler. Are you then saying that the stay, that it was your position that the stay was not in effect because it was only a stay pending appeal and you haven't enforced the ordinance?

MR. MANGLER: There was no order to appeal. We were waiting for an order all this time.

MR. VOCI: Well, I think if you will recall the testimony, and I can affirmatively represent to the Court, they along with other groups that do this, schedule their visits in such a manner so as not to inundate any particular community. Now, you will recall that NPA went to Wilmette in November of last year. It's their turn again. We are now in November of '89.

So that is why in serving my client I have had to push to get the preliminary injunction matter resolved and on its way. So what has happened, I guess, is water under the bridge and we are at issue now. I guess that Mr. Mangler is renewing the request for a stay, I don't know, I'll let him speak for himself.

MR. MANGLER: Absolutely.

MR. VOCI: So if he is doing that, then this would be my response to that, if in fact the stay is not in place.

MR. MANGLER: The Court, I think, put its finger right on one of the principal points here, that they have by their own testimony 400 municipalities to solicit and to possibly deny them 28,000 people out of six million is not a horrendous, life-threatening situation where they are absolutely put out of business, and, of course, as the court mentions in the statement that I just read, the fact that they are really not prohibited even from soliciting in Wilmette if they comply with the ordinance – this originally was a motion, as I understood it, for preliminary injunction, and it is not the be-all and the end-all, the solution to the entire case.

I asked the Court for a stay so I could go to the Seventh Circuit, because as I read the cases and the decisions of the Seventh Circuit and the test for a preliminary injunction, based on, as I say, the 400 other places to go and all the other things that I listed in my response originally, I don't think they are a proper candidate for a preliminary injunction.

THE COURT: What is the harm to the village if I do enjoin them from enforcing it? I can't see from the testimony that I heard that it affects them one whit. I mean, you are telling me

there is not much damage to the plaintiff and I am saying I can't even vocalize any damage to Wilmette.

MR. MANGLER: I don't think there is really any damage.

THE COURT: What about the defendant? That's my question. How are you hurt by having that one part of your ordinance out of business while it is up in the court of appeals or until the court of appeals – you know, you also have the right to go upstairs and say I did this wrong, so it wouldn't last very long if I were wrong. How are you hurt?

MR. MANGLER: That is what I asked for originally, Judge, a short stay to go to the Seventh Circuit, and your Honor said, "I will stay it pending appeal."

THE COURT: Well, you see, the nice thing about this is I can always change my mind. Whichever way I go on this, if I say I am going to stay it pending appeal or I say I'm not going to stay it pending appeal, is not of great consequence, because the aggrieved party here can simply go up and ask the Seventh Circuit before the appeal even starts, the briefing ever even starts, to change my order.

MR. MANGLER: Yes, yes.

THE COURT: So it is not some monumental thing I am doing, in the first instance, and in the second instance my own sense of it is if you engage in a balancing of the hardships I can't see because of my findings about the limited – and "limited" is a charitable term – use that Wilmette makes of this, I can't see how it harms Wilmette at all.

So they are on a zero plane and it seems to me I have already said it does hurt these people somewhat in soliciting in Wilmette. We heard that at the hearing. They lose some of their solicitors who won't do this.

So my sense is it seems to me that it should not be stayed, it should stand until the Seventh Circuit tells me otherwise. That's my best judgment.

Wilmette Village Code,
1967, As Amended
Section 5-5.3

5-5.3 APPLICATION FOR CERTIFICATE OF REGISTRATION. Application for a Certificate of Registration shall be made upon a form provided by the Chief of Police of this municipality and filed with such Chief. The applicant shall truthfully state in full the information requested in the application, to-wit:

(a) Name and address of present place of residence and length of residence at such address; also business address if other than residence address; also Social Security number;

(b) Address of place of residence during the past three years if other than present address;

(c) Age of applicant and marital status; and if married the name of spouse;

(d) Physical description of the applicant;

(e) Name and address of the person, firm or corporation or association whom the applicant is employed by or represents; and the length of time of such employment or representation;

(f) Name and address of employer during the past three years if other than the present employer;

(g) Description sufficient for identification of the subject matter of the soliciting which the applicant will engage in;

(h) Period of time for which the certificate is applied for;

(i) The date, or approximate date, of the latest previous application for certificate under this ordinance, if any;

(j) Has a Certificate of Registration issued to the applicant under this ordinance ever been revoked;

(k) Has the applicant ever been convicted of a violation of any of the provisions of this ordinance, or the ordinance of any other Illinois municipality regulating soliciting;

(l) Has the applicant ever been convicted of the commission of a felony under the laws of the State of Illinois or any other state or federal law of the United States;

(m) Also such additional information as the Chief of Police may deem necessary to process the application.

All statements made by the applicant upon the application or in connection therewith shall be under oath.

The Chief of Police shall require every applicant to submit to finger printing by the Police Department of this municipality in connection with the application for certificate.

The Chief of Police shall cause to be kept in his office an accurate record of every application received and acted upon together with all other information and data pertaining thereto and all Certificates of Registration issued under the provisions of this ordinance, and of the denial of applications. Applications for certificates shall be numbered in consecutive order as filed, and every certificate issued, and any renewal thereof, shall be identified with the duplicate number of the application upon which it was issued.

No Certificate of Registration shall be issued to any person who has been convicted of the commission of a felony under the laws of the State of Illinois or any other state or federal law of the United States, within five years of the date of the application; nor to any person who has been convicted of a violation of any of the provisions of this ordinance, nor to any person whose Certificate of Registration issued hereunder has previously been revoked as herein provided.

Supreme Court, U.S.
FILED
FEB 22 1991
OFFICE OF THE CLERK

(2)

No. 90-1083

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VILLAGE OF WILMETTE and FRED W. STOECKER,

Petitioners,

-vs-

NATIONAL PEOPLES ACTION,

Respondent.

On Petition for Writ of Certiorari
From The United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward A. Voci
2714 North Laramie Avenue
Chicago, Illinois 60639
312.622.8624

Counsel of Record for Respondents

BEST AVAILABLE COPY

22

No. 90-1083

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VILLAGE OF WILMETTE and FRED W. STOECKER,

Petitioners,

-vs-

NATIONAL PEOPLES ACTION,

Respondent.

On Petition for Writ of Certiorari
From The United States Court of Appeals
For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Edward A. Voci
2714 North Laramie Avenue
Chicago, Illinois 60639
312.622.8624

Counsel of Record for Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

PETITIONERS FAIL TO STATE FACTS MATERIAL TO THE QUESTIONS PRESENTED..... 1

THE PETITION FOR WRIT OF CERITORARI SHOULD BE DENIED..... 3

I. The Circuit Court of Appeals for the Seventh Circuit neither ignored any standards for issuance of the preliminary injunction nor "misconstrued" the District Court's findings.....4

A. Irreparable harm..... 4

B. Inadequate remedy at law..... 5

C. Probability of success on the merits.... 5

D. "Sliding Scale": Weighing relative harm of the parties and the public against success on the merits..... 7

II. There is no conflict among the Circuit Courts

of Appeals concerning standards for issuance of preliminary injunctions..... 8

III. Fingerprinting of solicitors is not an important national issue..... 12

IV. There is no conflict among the two Circuit Courts of Appeals which have considered the chilling effect of fingerprinting on solicitors..... 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Airline Pilots Ass'n v. Alaska Airlines, Inc., 898 F.2d 1393 (9th Cir. 1990)..... 10

Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987)..... 10

Allied Marketing Group, Inc. v. CDL Marketing Inc., 878 F.2d 806 (5th Cir. 1989)..... 10

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 114 (8th Cir. 1981)..... 12

Fennel v. Butler, 570 F.2d 263 (8th Cir. 1977), certiorari denied, 437 U.S. 906, 57 L.Ed.2d 1136 (1978)..... 11

Flower Cab v. Petitte, 685 F.2d 192 (7th Cir. 1982)..... 5

Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1989), affirmed, No. 89-1332, ____ U.S.____ (February 20, 1991)..... 10

Holy Spirit Assn. v. Hodge, 582 F. Supp. 492 (N.D. Tex. 1984).. 13-14

In Re DeLorean Motor Co., 755 F.2d 1223 (6th Cir. 1985)..... 10

Interstate Air Freight Co. v. C.F. Air Freight, 882 F.2d 797 (3rd Cir. 1989), certiorari denied, 110 S.Ct. 836, 107 L.Ed.2d 831..... 9

Long Island R. Co. v. Internat'l Ass'n of Machinists, 874 F.2d 901 (2nd 1989), certiorari denied, 107 L.Ed.2d 831 (1990)..... 9

Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973)..... 11

New Jersey Citizen Action v. Edison Township, 797 F.2d 1250 (3rd Cir. 1980), certiorari denied, 479 U.S. 1103 (1987)..... 13-14

Roland Machinery Co., v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984)..... 10

Sampson v. Murray, 415 U.S. 61., 39 L. Ed.2d 166 (1974)..... 9

Sea Containers Ltd. v. Stena 890 F.2d 1205 (D.C.12 989)..... 10

Snook v. Trust Co. of Georgia, 909 F.2d 480 (11th Cir. 1990)..... 10

State of California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989)..... 10

Synanon Foundation, Inc. v. California, 444 U.S. 1307, 64 L.Ed.2d 454 (1979)..... 3

Thornburg v. American College, 476 U.S. 747, 90 L.Ed.2d 779 (1986)..... 9

Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir. 1986) and 874 F.2d 1346 (10th Cir. 1989)..... 10

Unisys Corp. v. Dataware Products, Inc., 848 F.2d 311 (1st Cir. 1988)..... 9

United States v. Singer Co., 889 F.2d 1327 (4th Cir. 1989)..... 9

University of Texas v. Camenisch, 451 U.S. 390, 68 L.Ed.2d 175 (1981)..... 9

Ward v. Rock Against Racism, 109 S.Ct. 2740 (1989)..... 7, 14

No. 90-1083

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

VILLAGE OF WILMETTE and FRED W. STOECKER,

Petitioners,

-vs-

NATIONAL PEOPLES ACTION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents request that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered on October 3, 1990 and reported at 914 F.2d 1008, be denied.

PETITIONERS FAIL TO STATE FACTS MATERIAL TO THE QUESTIONS PRESENTED

Petitioner's door-to-door solicitors chose not to solicit rather than submit to fingerprinting which they associated with having committed a crime. The fingerprinting, as conducted by Petitioners' at the village police station, could not be used, and were not used, for conducting criminal background investigations and these investigations could be conducted, and were conducted, by other means.

The only possible use of the fingerprints would be subsequent criminal investigations, but even this possible use was remote because of the unprofessional procedure in which the fingerprints are taken (on the back of the solicitor application form and not on special classification cards). Furthermore, the fingerprinting of solicitors had <u>never</u> been used for subsequent criminal investigations.

Not only had Respondent's solicitors refused to submit fingerprinting, but, according to the testimony of Petitioner Stoecker (the chief of police), other prospective solicitors had forgone applying for solicitation permits when they saw the fingerprinting process.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Petitioners assert in the body of the Petition (although not framed as "Questions Presented") that: 1) the Court of Appeals "ignored" some of the standards for issuance of preliminary injunction and "misconstrued" the District Court's findings; 2) there is lack of uniformity among the Circuit Courts of Appeals concerning preliminary injunctions; 3) the chilling effect of fingerprinting is an important national issue; and 4) there is lack of uniformity among the Circuit Courts of Appeals on the fingerprinting issue.

The foregoing assertions have not been demonstrated by Petitioners. The Court should deny the Petition for Writ of Certiorari because the United States Court of Appeals for the Seventh Circuit did not "improvidently exercise" its discretion. Synanon foundation, Inc. v. Texas, 444 U.S. 1307, 64 L.Ed.2d 454 (1979) (Rhenquist, J. in chambers) and the cases cited therein.

I.

THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT NEITHER "IGNORED" ANY STANDARDS FOR ISSUANCE OF THE PRELIMINARY INJUNCTION NOR "MISCONSTRUED" THE DISTICT COURT'S FINDINGS.

Petitioners fail to demonstrate that the Court of Appeals for the Seventh Circuit in its review of the District Court's decision, ignored any of the standards for issuing a preliminary injunction. The Court of Appeals found that the District Court was not clearly erroneous and did not abuse its discretion, this being the standard of review for preliminary injunctions. See, Decision Below, Petition p. 4a-5a. The Circuit Court of Appeals addressed and weighed irreparable harm, inadequacy of remedies at law, probability of success on the merits, and relative harm to the parties and the public.

A. Irreparable Harm. The Court of Appeals directed sharp attention to this issue and reiterated the longstanding tenet that "... even a temporary deprivation of first amendment freedom of expression rights is generally sufficient to prove irreparable harm", citing a long line of precedent. The Court of Appeals flatly rejected Petitioners' argument that Respondent suffered no harm because it could solicit in other localities. See, Decision Below at Petition pp. 9a-10a. The Court of Appeals upheld the District's finding that the fingerprinting inhibited

speech by discouraging prospective solicitors. The opinion quoted the testimony of Police Chief Stoecker which established that prospective solicitors were scared away by the fingerprinting. Opinion Below, Petition p. 3a. In addition, the District Court found that Respondent's solicitors chose not to solicit rather than be fingerprinted.

B. Inadequate Remedy At Law. The Court of Appeals dealt squarely with this issue and concluded that "... injunctions are especially appropriate in the context of first amendment violations because of the inadequacy of money damages", citing its previous decision in Flower Cab v. Petitte, 685 F.2d 192 (7th Cir. 1982). See, Decision Below at Petition p. 10a.

C. Probability of Success On The Merits. As Petitioners correctly point out, the Court of Appeals found ample support in the record to support the District Court's finding that Respondent established a probability of success on the merits.

Petitioners go on, however, to chide the Court of Appeals for finding "ample support in the record" for the District Court's ruling as if the Court of Appeals rested its decision on the two, off-handed remarks made by the District Court and culled from the record by Petitioners. Petitioners completely ignore both the specific ruling of the District Court and the Court of Appeals' careful review and analysis of the facts developed at the preliminary injunction hearing. See,

Opinion Below at Petition pp. 2a-3a, 8a-9a. In summary, the Court of Appeals determined that the record amply supported the following District Court findings:

> i) Petitioner's solicitors chose not to solicit rather than submit to fingerprinting which they associated with having committed a crime;
>
> ii) the fingerprinting as conducted by Petitioners' procedures could not be used for conducting criminal background investigations and these investigations could be and were conducted by other means);
>
> iii) the only possible use of the fingerprints would be subsequent criminal investigations, but even this possible use would be fraught with problems because of the unprofessional manner in which the fingerprints are taken;
>
> iv) the fingerprinting of solicitors had never been used for subsequent criminal investigations and;
>
> v) that fingerprinting had a chilling effect on protected speech because not only had Respondent's solicitors refused to submit fingerprinting, but other prospective solicitors had forgone applying for

solicitation permits when they saw the fingerprinting process.

The Court of Appeals properly concluded that all of the foregoing demonstrated Respondent's probability of succeeding on the merits and Petitioners' failure to demonstrate any likelihood of success because fingerprinting solicitors does not promote "a substantial government interest that would be achieved less effectively absent the regulation", as required by Ward v. Rock Against Racism, 109 S.Ct. 2740 (1989).

The Court of Appeals spoke in terms of a "probability of success". Petitioners attempt to make distinctions between "reasonable likelihood", "some likelihood", and "probability" of success on the merits. These are semantic differences, and nothing more, because the "sliding scale" balanced harm against likelihood of success and the quantum of one is tied to the quantum of the other. This is discussed next.

D. "The Sliding Scale": Weighing Relative Harm Of The Parties And The Public Against Likelihood of success. The Court of Appeals concluded its opinion with its "sliding scale" analysis which balanced harm to the parties and the public against the likelihood of success on the merits. Opinion Below at Petition pp. 5a, 10a. Petitioners and the public would not suffer harm because the fingerprinting is worthless and Petitioners did not demonstrate any

likelihood of success on the merits because the fingerprinting inhibited protected speech. Thus, Petitioners' side of the scale was empty.

Having previously found that Respondent would suffer irreparable harm and had shown a probability of succeeding on the merits, the Respondent's side of the scale was heavy. The scale shifted decidedly toward Respondent.

The Court of Appeals left no stone unturned in examining the District Court's decision to grant preliminary injunctive relief. It "misconstrued" nothing.

II.

THERE IS NO CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS CONCERNING STANDARDS FOR ISSUANCE OF PRELIMINARY INJUNCTIONS.

Petitioners nakedly assert that there is a lack of uniformity among the Circuit Courts of Appeals relative to the standards for issuance of preliminary injunctions. Yet, Petitioners fail to demonstrate it. They fail to cite <u>any cases at all</u>. Indeed, an examination of the decisions indicates uniformity among the Circuit Court of Appeals. Each and every Circuit Court of Appeals has utilized the traditional elements of

irreparable harm and inadequate remedies at law recognized by the this Court in Sampson v. Murray, 415 U.S. 61. 39 L. Ed 2nd 166 (1974), Thornburg v. American College, 476 U.S. 747, 90 L.Ed.2d 779 (1986), and University of Texas v. Camenisch, 451 U.S. 390, 68 L.Ed.2d 175 (1981).

Two additional elements, a measure of success on the merits and a balancing of the respective harm to the parties and the public, have also been utilized by all Circuit Courts of Appeals for issuing preliminary injunctions. Like the Court of Appeals for the Seventh Circuit, the other courts balance the various factors to determine an equitable result. While the formulations are not carbon copies of one another (although some are identical), the legal principles are uniform. The Court is referred to the following decisions:

Unisys Corp. v. Dathware Products, Inc., 848 F.2d 311 (1st Cir. 1988), certiorari denied, 110 S.Ct. 836, 107 L.Ed.2d 831;

Long Island R. Co. v. Internat'l Ass'n of Machinists, 874 F.2d 901 (2nd Cir. 1989), certiorari denied, 107 L.Ed.2d 831 (1990);

Interstate Air Freight Co. v. C.F. Air Freight, 882 F.2d 797 (3rd Cir. 1989);

United States v. Singer Co., 889 F.2d 1327 (4th Cir. 1989);

Allied Marketing Group, Inc. v. CDL Marketing Inc., 878 F.2d 806 (5th Cir. 1989);

In Re DeLorean Motor Co., 755 F.2d 1223 (6th Cir. 1985);

Airlines Reporting Corp. v. Barry, 825 F.2d 1220 (8th Cir. 1987) and Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109 (8th Cir. 1981) (en banc);

State of California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989) and Airline Pilots Ass'n v. Alaska Airlines, Inc., 898 F.2d 1393 (9th Cir. 1990);

Tri-State Generation v. Shoshone River Power, Inc., 805 F.2d 351 (10th Cir 1986) and 874 F.2d 1346 (10th Cir. 1989);

Haitian Refugee Center, Inc. v. Nelson, 872 F.2d 1555 (11th Cir. 1990), affirmed, No. 89-1332, ____ U.S.____ (February 20, 1991); and Snook v. Trust Co. of Georgia, 909 F.2d 480 (11th Cir. 1990);

Sea Containers Ltd. v. Stena, 890 F.2d 1205 (D.C. Cir. 1989).

Petitioners cite Roland Machinery Co., v. Dresser Industries, 749 F.2d 380 (7th Cir. 1984) for the proposition that there is a lack of uniformity among the Circuit Courts of Appeals and quote one sentence from the opinion. In the same opinion, however, the Court of Appeals for the stated:

> "....But the apparent discord is mostly verbal. Beneath the welter of apparently conflicting precedents we sense agreement on the following principles: ...[irreparable injury to plaintiff, inadequate remedy at law, relative harm to defendant, likelihood of success on the merits, and the public interest]...". 749 F.2d at 385.

Indeed, these agreed upon factors are the very factors which have traditionally been utilized by courts of equity in deciding preliminary injunctions.

The Court of Appeals for the Eighth Circuit, which had enumerated the "traditional test" in Minnesota Bearing Co. v. White Motor Corp., 470 F.2d 1323 (8th Cir. 1973), had been credited with formulating an "alternative test" in Fennel v. Butler, 570 F.2d 263 (8th Cir. 1977), certiorari denied, 437 U.S. 906, 98 S.Ct. 3093, 57 L.Ed.2d 1136 (1978). That court, however, has now made it clear that what has been called an "alternative test" by the Courts of Appeals for the Second and Ninth Circuits is really nothing different from the "traditional test" followed in all other Circuit Courts of Appeals:

> "Despite this label [i.e. 'alternative test'], we find no contradiction between Fennell and Minnesota Bearing. Whatever the verbal formulation, the

> relevant factors remain the same. Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest."

Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981).

Therefore, while the various Circuit Courts of Appeals may have developed different formulations, there have adhered to consistent legal principles. There is no conflict. The realm of preliminary injunctive relief is not susceptible to "wooden" tests. "Our goal has been to achieve a clear verbal formulation yet maintaining a flexible rule". Dataphase Systems, Inc. v. C L Systems, Inc., 640 F.2d at 114.

III.

FINGERPRINTING OF SOLICITORS IS NOT AN IMPORTANT NATIONAL ISSUE

Only two Circuit Courts of Appeals have considered the chilling effect of fingerprinting ordinances as applied to

door-to-door solicitors: the Court of Appeals for the Seventh Circuit, in the instant case, and the Court of Appeals for the Third Circuit in New Jersey Citizen Action v. Edison Township 797 F.2d 1250 (3rd Circ. 1980), certiorari denied, 479 U.S. 1103 (1987). (In Holy Spirit Assn. v. Hodge, 582 F. Supp. 492 (N.D. Tex. 1984), cited at Petition, p.7, the fingerprinting issue was decided on the face of the ordinance, not on its application.) These cases arose from ordinances promulgated by two localities in two states, Illinois and New Jersey respectively. These two, isolated instances among the thousands of localities, the fifty States and the twelve Circuit Courts of Appeals hardly rise to the level of importance requiring review by this Court.

IV.

THERE IS NO CONFLICT AMONG THE TWO CIRCUIT COURTS OF APPEALS WHICH HAVE CONSIDERED THE CHILLING EFFECT OF FINGERPRINTING ON THE EXERCISE OF SPEECH BY SOLICITORS.

Petitioners assert that there is a lack of uniformity on the fingerprinting issue, but fail to demonstrate it. They are hard pressed to do so because both the Court of Appeals for the Seventh Circuit and the Court of Appeals for the Third Circuit have found that fingerprinting has

a chilling effect on the exercise of protected speech by solicitors. Furthermore, the Court of Appeals for the Seventh Circuit in its Decision Below found that fingerprinting did not promote a substantial government interest as required by Ward v. Rock Against Racism, supra. The Court of Appeals for the Third Circuit in New Jersey Citizen Action, supra, found that there was "no demonstrated relationship" between canvassers and criminal behavior. The latter was decided before Ward. There can be little doubt the Third Circuit would have arrived at the same result if it had been guided by Ward's "promote a substantial government interest" test. Again, the District Court decision in Holy Spirit Assn. v. Hodge, supra, is not relevant to the uniformity issue as it did not consider a fingerprinting ordinance as applied, only on its face.

Therefore, the chilling effect of fingerprinting, although only ruled upon by two Circuit Court of Appeals, has been uniformly held unconstitutional.

V.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Submitted by,

EDWARD A. VOCI
2714 North Laramie Avenue
Chicago, Illinois 60639
312.622.8624

COUNSEL OF RECORD FOR RESPONDENT, NATIONAL PEOPLES ACTION